LEGAL MEMORANDUM

A Constitutional Analysis of Proposed Content-Control Requirements for Tobacco Product Advertising

prepared by
Covington & Burling
Washington, DC
20004

The analysis presented in this memorandum would apply to federal legislation discriminating against advertising for any product—not just legislation discriminating against tobacco product advertising

A Constitutional Analysis of Proposed Content-Control Requirements for Tobacco Product Advertising

Representative Luken and Representative Synar have introduced substantially similar bills (H.R. 1250 and H.R. 1493) designed to eliminate tobacco product advertising and promotion for all practical purposes. These bills, if enacted, would limit severely the content of tobacco product advertisements and the design of tobacco product packages, ban tobacco product advertising in certain places, eliminate all forms of tobacco product promotion and prohibit the use of tobacco product trademarks to sell nontobacco products. H.R. 1250 and H.R. 1493 also would grant state and local jurisdictions broad authority to establish their own requirements and prohibitions based on smoking and health with respect to the advertising and promotion of cigarettes.[1]

[1] In addition, H.R. 1250 would ban the sale of cigarettes through vending machines in any place open to persons under 18. The bill also would require the Federal Trade Commission to arrange for testing of "the constituents of tobacco smoke." H.R. 1493 would define any tobacco product advertised, promoted or packaged in violation of its terms as a "misbranded drug" under Sec. 502 of the Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 352. This would make violations of H.R. 1493 "prohibited acts" under Sec. 301 of the FD&C Act, 21 U.S.C. § 331, subject to criminal and civil penalties under Secs. 302-307 of the FD&C Act, 21 U.S.C. §§ 332-337. The misbranding provisions of the FD&C Act currently apply only to product labeling.

In the last two Congresses, Representatives Synar and Whittaker tried without success to muster support for a total ban on tobacco product advertising.[2] Representatives Luken and Synar now have proposed legislation that they insist is "reasonable" and "limited,"[3] but these bills plainly would be, for all practical purposes, tantamount to a total advertising ban.[4] Consumers are bombarded every day by distinctive commercials promoting a wide variety of products and services. Under H.R. 1250 and H.R. 1493, tobacco product advertising (and, indeed, tobacco products themselves) would be rendered virtually invisible, and tobacco product manufacturers would be unable to distinguish their brands from those of their competitors. Advertising that passes unnoticed amounts to no advertising at all.

We believe that H.R. 1250 and H.R. 1493 would be held to be unconstitutional. The proposed restrictions could not pass muster under the Supreme Court's test for restrictions on commercial speech. Under the test established in the *Central Hudson* case and reaffirmed in *Posadas* and *Fox,* any

[2] *See* H.R. 4972, 99th Cong., 2d Sess. (1986); H.R. 1272, 100th Cong., 1st Sess. (1987); H.R. 1532, 100th Cong., 1st Sess. (1987).

[3] Rep. Thomas A. Luken Dear Colleague Letter Seeking Co-Sponsors, March 13, 1989, p. 2; *see* Rep. Mike Synar Dear Colleague Letter Seeking Co-Sponsors, March 3, 1989.

[4] Their ostensibly more limited approach was proposed by the American Cancer Society in 1986 as a "first step" toward an outright ban. *See* ACS News Release, March 24, 1986. Their key provisions appear to have been drafted by the Coalition on Smoking OR Health for use "if a complete ban * * * cannot be achieved promptly." *See* Coalition on Smoking OR Health, "Agenda for 1989-1990," p. 3 (Jan. 25, 1989).

restriction on commercial speech must "directly advance" a substantial governmental interest and must be a "narrowly tailored" means of promoting that governmental interest. The proponents of H.R. 1250/1493 could not demonstrate that the restrictions contemplated by the bills would satisfy those requirements.

H.R. 1250/1493, if adopted, is likely to spawn similar proposals to restrict advertising of other controversial products or services. Indeed, the Advertising and Marketing Panel of the Surgeon General's Workshop on Drunk Driving recently recommended severe restrictions on alcoholic beverage advertising, and Representative Waxman has threatened "an outright ban on all prescription drug advertising aimed at consumers."[5] H.R. 1250/1493 also raises urgent First Amendment concerns because its "antipreemption" provision effectively would license outright censorship of cigarette advertising by state and local governments.

Previous proposals for an outright ban on tobacco product advertising provoked an extraordinary First Amendment outcry from across the political spectrum.[6] The Luken/Synar bills—which the ACLU has

[5] "A Major Koopla: Alcoholic Industry Worries About Ban of Advertising," *Adweek,* Dec. 19, 1988, p. 2; "Pitching Pharmaceuticals to the Public," *Washington Post,* May 16, 1988, at H7.

[6] Opponents included the ACLU, the Department of Justice and the Chairman of the Federal Trade Commission, as well as some of the most distinguished scholars in the nation. In February 1987, the American Bar Association rejected a proposal urging it to endorse a ban on tobacco product advertising. It did so, according to ABA President Eugene Thomas, because of free speech concerns. *Advertising Age,* Feb. 23, 1987, p. 80.

condemned as "a ban in sheep's clothing"[7]—likewise should be rejected.

DESCRIPTION OF H.R. 1250/1493

1. Advertising and Packaging

Under H.R. 1250/1493, an advertisement for a tobacco product could include only two elements—a picture of the package (displayed against a "neutral" or "white" background), and any accompanying printed text, which would have to appear in black type on a white background. Representations of people, and pictures generally, would be prohibited, and no "brand name logo or symbol" could be used. Under H.R. 1250, the type in any printed text would have to be the same size and style as the type in the Surgeon General's warning. Under either bill, the picture of the package could be no larger than the "actual size" of the package and the package displayed in the picture could include only printed text (black type on a white background).[8] Under H.R.

[7] Statement on H.R. 1493 by Barry Lynn, Legislative Counsel, ACLU, March 16, 1989, p. 1; *Hearing on H.R. 1250 before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce,* 101st Cong., 1st Sess. (July 25, 1989) ("1989 Hearing") (prepared statement of Barry Lynn, ACLU, p. 5).

[8] The "actual size" requirement effectively would preclude the use of such pictures on billboards. In addition, H.R. 1250/1493 expressly would prohibit all tobacco product advertising at sports stadiums and other sports facilities not only on billboards but also in programs or on flyers. Price advertising theoretically would be allowed under H.R. 1250/1493, but variations from market to market generally render price advertising unfeasible. In addition, the manufacturers of tobacco products—who are responsible for the bulk of the advertising at issue—do not set retail price.

1250, the content of the text on the package would be limited to information specified in the bill, and the type would have to be the same size and style as the "tar" and nicotine information.

2. Promotion

H.R. 1250/1493 effectively would prohibit all tobacco product advertising or promotion except in newspapers and magazines and on signs and billboards. Although the two bills differ in some of the details, four established forms of "promotion" essentially would be prohibited.

- *Samples and Premiums.* It would be unlawful to distribute "samples" of tobacco products or to promote tobacco products using "premiums" or coupons offering free samples.
- *Brand-Name Sponsorship of Athletic, Artistic or Other Events.* It would be unlawful to sponsor any athletic or cultural events under the registered brand name of a tobacco product.
- *Use of Tobacco Product Trademarks on Non-tobacco Products.* It would be unlawful to market non-tobacco products or services bearing the registered brand name or logo of a tobacco product.
- *Toys and Sports Equipment.* It would be unlawful to display a registered brand name of a tobacco product appearing on toys, cars, boats, animals, or other sporting equipment.
- *Product Placements.* It would be unlawful to pay to have a registered brand name of a tobacco product appear in any movie or play.

H.R. 1250/1493 would make an exception to the first four of these prohibitions where the registered

brand name in question was the name of a corporation in existence prior to enactment.

3. Preemption

H.R. 1250 contains an "antipreemption" provision specifying that—

> "State and local governments may regulate the consumer sales promotion of any tobacco product to the extent not inconsistent with Section 3, except that no State or local government may by statute or regulation require the use of any warning on any tobacco product which is different from a warning required by Federal law." Sec. 4(c).

H.R. 1493's antipreemption provision specifies that nothing in that bill, and nothing in section 5 of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, shall prevent any state or local government from regulating—

> "(1) the location of any advertising for tobacco products which is displayed within the geographic area governed by the applicable State or local government, such as advertising on billboards and on transit vehicles, and
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> (2) the sale, distribution, or promotion of tobacco products within the geographic area governed by the applicable State or local government, so long as such actions are consistent with and no less restrictive than requirements of this Act and the Federal Cigarette Labeling and Advertising Act." Sec. 7.

H.R. 1250/1493 AND THE FIRST AMENDMENT

A. The "Text Only" Approach Would Be Tantamount to a Total Advertising Ban

Despite the terms of H.R. 1493, Rep. Synar has insisted—incredibly—that the bill does not "plac[e] new restrictions on what a manufacturer can say in ads."[9] He also has maintained that the "text only" approach of H.R. 1493 would simply make tobacco product advertisements unattractive to minors and "women, minorities, the low-income and [the] under-educated," while leaving cigarette manufacturers otherwise free to compete.[10] Rep. Synar has said H.R. 1493 "won't inhibit that advertising effort,"[11] and Rep. Luken has suggested a similar interpretation of H.R. 1250.[12]

Apart from its obvious condescension toward "women, minorities, the low-income and [the] under-educated"—whom Rep. Synar, at least, evidently believes are unable to make intelligent choices when it comes to purchasing products—H.R. 1250/1493 reflects a basic misunderstanding of the purpose and function of images and other attention-getting devices in tobacco product advertisements.

Tobacco products have been manufactured and sold for hundreds of years. As such, they constitute a "mature" product whose availability and qualities are widely known to consumers. The purpose and

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[9] Press Release, March 16, 1989, p. 2.

[10] Dear Colleague Letter Seeking Co-Sponsors for H.R. 1493, March 3, 1989, p. 1.

[11] Press Release, March 16, 1989, p. 2.

[12] *1989 Hearing,* Tr. 263-65.

function of advertising for such "mature" products is not to stimulate overall demand for the product category but to increase the market share of a particular brand at the expense of competing brands and to retain brand loyalty against other brands—equally important goals. As the Council of Economic Advisors has stated, tobacco product advertising "mainly shifts consumers among brands."[13]

Successful brand promotion in a mature product market must overcome two hurdles. First, the advertising must attract the viewer's attention. Second, and no less important, the advertising must distinguish the advertised brand from the multitude of others on the market. The long-term success of a brand depends on "building the * * * most sharply defined *personality* for [the] brand."[14] In short, both the advertisement itself and the advertised brand must stand out from the crowd. The pale commercial notices permitted under H.R. 1250/1493—devoid of distinctive images and perhaps even slogans and colors—could accomplish neither objective.

Consumers are exposed to countless advertisements each day in a variety of media. Advertisers constantly must struggle to break through the resulting

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[13] *Economic Report of the President* 186 (1987). The Surgeon General agreed in 1979, stating that "the major action of cigarette advertising now seems to be to shift brand preferences, to alter market share for a particular brand." *Smoking & Health: A Report of the Surgeon General* 18-23 (1979).

[14] Phillips, "Can 'Commodity Thinking' Kill Established Brands?" *Adweek*, Dec. 8, 1986, p. 18 (emphasis in original).

"commercial clutter."[15] To do so, advertisers use eye-catching models in eye-catching settings and employ bold graphic designs and arresting brand slogans. Through these devices the advertiser hopes to gain the consumer's momentary attention—and, with it, a chance to speak directly to the consumer.

The bland fare that would be permitted under H.R. 1250/1493 could not compete for consumer attention with flashy and distinctive advertising for other products. Visually effective advertisements for other products inevitably would crowd tobacco product advertisements out of the public mind if such advertisements were limited as Rep. Luken has proposed. In making tobacco product advertisements unattractive to those the bill seeks to "protect," H.R. 1250/1493 would make such advertisements essentially invisible to everyone else.[16]

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[15] According to George Gallup, two advertised products in the same commodity group, using the same size space, can differ by as much as 12 to 1 in their ability to command attention and register the product's brand name. Gallup, "How Advertising Works," 23 *J. Advertising Res.* 76, 78 (1983). Research shows that "about 13% of magazine ads are totally missed by the reader, largely because of ad clutter," and that "readers are totally ignoring 40% of advertised names." *See* "Eye-Tracking Research Bolsters Claims of Bus Shelter Advertising Effectiveness," *Marketing News,* Oct. 28, 1983, p. 8; Alter, "Research on Eye Movement Shows Editorial Environment *Does* Affect Ad Readership," *Magazine Age,* Oct. 1982, p. 42. It has been reported that "[s]ome 85% of magazine readers do not remember seeing the average advertisement." Ogilvy & Raphaelson, "Research Advertising Techniques that Work—and Don't Work," *Harvard Business Review,* July-Aug. 1982, p. 14.

[16] The Supreme Court specifically has held in the commercial speech context that "the government may not restrict speech so as

These advertisements similarly would not be an effective means of brand differentiation. Individual cigarette brands are not necessarily distinguishable on the basis of objective characteristics that can be "explained." Accordingly, a cigarette manufacturer must identify a distinct group of consumers who already smoke, and then promote its brand effectively *with that group* through the "personality" created for the brand.[17] As Professor Scott Ward has explained:

> "An advertiser attempting to promote a brand that is not objectively distinguishable from other brands * * * aims to promote his brand with particular groups of consumers by saying, in effect, 'if you are this kind of consumer, Brand X is for you; if you are that kind of a consumer, Brand Y is for you.' The advertiser, in other words, chooses a particular consumer group at which to aim his message and tailors his message in a way that will strike a responsive chord with that group. People in our society cluster in 'taste cultures,' and it is at these groupings that advertisers direct their messages."[18]

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to reduce the adult population * * * to reading only what is fit for children." *Bolger* v. *Youngs Drug Product Corp.*, 463 U.S. 60, 73 (1983).

[17] *See* Phillips, *supra* note 15, p. 18.

[18] *Advertising Tobacco Products: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 667 (1986) ("1986 Hearings") (citation omitted). *See* P. Kotler, *Marketing Management* (5th ed. 1984); J. Engel, H. Fiorillo & M. Cayley, *Market Segmentation* (1972); D. Yankelovich, "New Criteria for Market Segmentation," *Harvard Business Review* (March-April 1964); J. Plummer, "Life Style

In short, it is the consumer who shapes the advertisement—not the other way around. To reach particular consumer audiences, advertisers use models who match pre-existing consumer categories.[19] Under H.R. 1250/1493, however, tailoring particular brands to such distinct categories of the adult smoking market would be impossible. The pseudo-advertising permitted under H.R. 1250/1493 would, in practice, be so ineffectual that it could not be considered a meaningful form of communication.

B. H.R. 1250/1493 Rests on Three Invalid Premises About the First Amendment

As discussed below, H.R. 1250/1493 cannot satisfy the test established in the *Central Hudson* case for restrictions on commercial speech. The proponents of H.R. 1250/1493 appear to believe that this test would be applied with reduced rigor because images in advertising are marginal from a First Amendment standpoint, alternative techniques of communication would remain available and the very effectiveness of images is somehow a justification for suppressing them. Before addressing the *Central Hudson* test, we explain why each of these premises is incorrect.

Patterns: New Constraint for Mass Communication Research," *Journal of Broadcasting* (Winter 1971-1972); W. Smith, "Product Differentiation and Market Segmentation as Alternative Marketing Strategies," *Journal of Marketing* (July 1956); A. Roberts, "Applying the Strategy of Market Segmentation," *Business Horizons* (Fall 1961).

[19] *See* M. Schudson, *Advertising, The Uneasy Persuasion* 183 (1986) ("It is more accurate to observe that cigarette smoking among women led tobacco companies to advertise to the female market than to suggest that advertising created the market in the first place.").

1. Visual Techniques in Advertising Are Entitled to the Same Degree of First Amendment Protection as Text

In *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626 (1985), the Supreme Court stated that "[t]he use of illustrations or pictures in advertisements serves important communicative functions: *it attracts the attention of the audience to the advertiser's message,* and it may also serve to impart information directly." *Id.* at 647 (emphasis added). For this reason, the Court stated, "commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test." *Ibid.*

Using this analysis, the Court in *Zauderer* struck down a rule prohibiting illustrations in advertisements by attorneys. It rejected the argument that the government "may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative * * *." 471 U.S. at 649. "[B]road prophylactic rules," it said, "may not be so lightly justified if the protections afforded commercial speech are to retain their force." *Ibid.*[20]

[20] The Court added:

> "We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alterntive of a blanket ban on the use of illustrations." *Ibid.*

Similarly, in *Bates* v. *State Bar,* 433 U.S. 350 (1977), the Court rejected the argument that attorneys could be limited to advertising their names and addresses in phone books: "[A]n advertising diet limited to such spartan fare would provide scant nourishment." *Id.* at 366-67. In *Bolger* v. *Youngs Drug Products Corp.,* 463 U.S. 60 (1983), the Court rejected an argument that advertisers could constitutionally be forced to wait for consumers to come to them. It recognized the right of sellers to use advertising tools that reach out and effectively communicate with potential purchasers. *See id.* at 69 n.18. And in *Shapero* v. *Kentucky Bar Ass'n,* 108 S. Ct. 1916 (1988), the Court held that a state "may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." *Id.* at 1924.

2. Visual Techniques Cannot Be Prohibited Because Alternative Means of Communication Would Continue To Be Allowed

The Supreme Court repeatedly has rejected arguments that restrictions on commercial speech may be justified by the availability of hypothetical alternative avenues of communication that would, in practice, be ineffective.

In *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), for example, the Court invalidated a prohibition on residential "For Sale" and "Sold" signs. The Court noted that, "[a]lthough in theory sellers remain free to employ a number of different alternatives, in practice * * * [t]he options to which sellers realistically are relegated" would be "less likely to reach persons not deliberately seek-

ing sales information" and would be "less effective media for communicating the message." *Id.* at 93 (emphasis added). Likewise, in *Bolger,* the Court invalidated a ban on unsolicited mail advertisements for contraceptives. It rejected the argument that the ban was permissible because it left open the possibility of mailing advertisements to persons who affirmatively requested them. Here, as in *Linmark,* the alternatives not foreclosed by the proposed restrictions "are far from satisfactory." 431 U.S. at 93.

3. The "Effectiveness" of Visual Techniques in Advertising Cannot Justify the Proposed Restrictions

In case after case, the Supreme Court has made clear that a speaker may not be burdened because his expression is too "effective."

In *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U.S. 684 (1959), New York attempted to justify the suppression of a motion picture, "Lady Chatterley's Lover," on the ground that it "attractively" portrayed adultery—which was not only immoral but against the law. Rejecting that justification, the Supreme Court observed that New York's argument—

> "misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. * * * And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." 360 U.S. at 689.

Similarly, in *Carey* v. *Population Services Int'l,* 431 U.S. 678 (1977)—a commercial speech case—the Court overturned a state ban on contraceptive

advertising, rejecting New York's argument that such advertising could be banned because it "legitimizes" illicit sexual behavior. *Id.* at 701.

Likewise, in *First Nat'l Bank* v. *Bellotti,* 435 U.S. 765 (1978), the Court struck down a Massachusetts statute prohibiting corporate advocacy in referendum campaigns. Massachusetts had attempted to justify its ban on the ground that corporate political advocacy might prove too effective. "To be sure," the Court said, "corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." 435 U.S. at 790. The Court later invalidated, on similar grounds, a Berkeley ordinance limiting contributions to committees formed to support or oppose ballot measures—a limitation justified by the city as necessary to prevent special interest groups from exerting inordinate influence over election outcomes. *Citizens Against Rent Control* v. *City of Berkeley,* 454 U.S. 290, 295, 298 (1981).

In short, the First Amendment protects not just advocacy but "effective advocacy." *Id.* at 295 (quoting *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958)). *See also Shapero* v. *Kentucky Bar Ass'n,* 108 S. Ct. 1916, 1921 (1988) ("the First Amendment does not permit a ban on certain speech simply because it is more efficient").

C. The Invalidity of H.R. 1250/1493 Under the First Amendment

Just last Term, the Supreme Court reaffirmed the "enduring lesson" of its decisions—"that the Govern-

ment may not prohibit expression simply because it disagrees with its message." *Texas* v. *Johnson,* 57 U.S.L.W. 4770, 4775 (U.S. June 20, 1989). The Court stated:

> "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 4774.

The Court has never held this principle inapplicable in the commercial speech context. To the contrary, the Court has ruled that commercial speech may not be banned to keep people from acting in ways the government considers unwise. *E.g., Linmark Associates, Inc.,* 431 U.S. at 96-97.

Since 1976, when it recognized that commercial speech is protected by the First Amendment, the Supreme Court has invalidated numerous content-based restrictions on truthful speech proposing lawful commercial transactions.[21] In no case since

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[21] *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976) (price advertising by pharmacists); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977) (residential "For Sale" and "Sold" signs); *Carey* v. *Population Services International,* 431 U.S. 678 (1977) (advertising and display of contraceptives); *Bates* v. *State Bar,* 433 U.S. 350 (1977) (advertising by lawyers); *Central Hudson Gas & Electric Corp.* v. *PSC,* 447 U.S. 557 (1980) (advertising by electric utilities); *In re R.M.J.,* 455 U.S. 191 (1982) (advertising by lawyers); *Bolger* v. *Youngs Drug Products Corp.,* 463 U.S. 60 (1983) (unsolicited mail advertisements for contraceptives); *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626 (1985) (advertising by lawyers); *Shapero* v. *Kentucky Bar Ass'n,* 108 S. Ct. 1916 (1988) (same). *Cf. Friedman* v. *Rogers,* 440 U.S. 1 (1979) (upholding statute prohibiting use of

1976 has the Court "approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson,* 447 U.S. at 566 n.9.

Commercial speech serves two fundamental values. First, our society does not tolerate government attempts to manipulate behavior by rationing information. Whether the speech is commercial or noncommercial, the First Amendment condemns paternalistic efforts by government to advance our welfare by keeping us in the dark. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia,* 394 U.S. 557, 565 (1969).[22]

Second, in addition to advancing this political value, commercial speech furthers economic objectives. It "inform[s] the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[23] The Supreme Court has stated that "the free flow of commercial information is indispensable" to our "predominantly free enterprise economy."[24]

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trade names by optometrists; trade names had been shown to be deceptive and served no communicative purpose); *San Francisco Arts & Athletics, Inc.* v. *USOC,* 483 U.S. 522 (1987) (upholding statute applied to limit use of trade name to one organization).

[22] *See also Virginia State Board of Pharmacy,* 425 U.S. at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.").

[23] *Bates,* 443 U.S. at 364.

[24] *Virginia State Board of Pharmacy,* 425 U.S. at 765.

In order to protect these core values, the Court in *Central Hudson* adopted a stringent four-part test for scrutinizing restrictions on commercial speech:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

Assuming for purposes of this discussion that H.R. 1250/1493 is meant to serve a substantial governmental interest, the bill is invalid under the *Central Hudson* test because the speech in question is clearly protected; the restrictions at issue are unlikely to achieve their stated purpose; and the restrictions are not a "narrowly tailored" means of promoting that purpose.[25]

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[25] The Court last Term reaffirmed that, to survive First Amendment scrutiny, any restriction on commercial speech must "directly advance" the government interest said to justify the restriction and must be a "narrowly tailored" means of promoting that interest. *Board of Trustees of the State University of New York* v. *Fox*, 57 U.S.L.W. 5015, 5017, 5018 (U.S. June 27, 1989). The Court emphasized that the government bears the burden of justifying the restriction. *Id.* at 5018.

The Court also made clear, in another First Amendment decision last term, that it will not automatically defer to a legislative "finding" that the means chosen are required to achieve the government's purposes. "Deference to legislative findings cannot limit judicial

1. Tobacco Product Advertising Is Protected Speech

Tobacco advertising plainly concerns a lawful activity (unlike, for example, casino gambling or prostitution, which in most jurisdictions is unlawful). By

inquiry when First Amendment rights are at stake." *Sable Communications of California, Inc.* v. *FCC,* 57 U.S.L.W. 4920, 4923 (U.S. June 20, 1989) (citation omitted).

The Court in *Fox* outlined a commonsense approach for applying the "fourth prong" of the *Central Hudson* test for assessing restrictions on commercial speech. That prong of the test, as noted, specifies that restrictions on commercial speech may be "not more extensive than necessary" to serve the asserted governmental interest. The Court in *Fox* rejected an extreme interpretation of this prong of the *Central Hudson* test—an interpretation that, as a practical matter, would make it all but impossible for restrictions on commercial speech to survive review.

Thus, the Court indicated in *Fox* that it would not require the government to demonstrate that a particular restriction on commercial speech is *"absolutely the least severe"* means of achieving the desired end. 57 U.S.L.W. at 5018. The government, in the Court's phrase, need not prove that there is *"no conceivable alternative"* to a challenged restriction. The Court made clear that it would not invalidate a restriction simply because the restriction goes *"marginally beyond"* what would adequately have served the governmental interest. *Ibid.*

But, while thus affording the government "needed leeway" to regulate commercial speech in this regard, the Court emphasized that its test was not meant to be "overly permissive." The Court stressed that its test for restrictions on commercial speech "is far different * * * from the 'rational basis' test used for Fourteenth Amendment equal protection analysis." 47 U.S.L.W. at 5018. The Court also distinguished the "narrow tailoring" requirement in the commercial speech from the "narrow tailoring" requirement in the context of time, place and manner restrictions. *Ibid.*

The Court added that, to justify a restriction on commercial speech as "narrowly tailored," the government also must demonstrate that the challenged restriction does not pursue the asserted governmental interest "at inordinate cost," which the Court emphasized must be "carefully calculated." *Ibid.*

the same token, tobacco product advertising—and, in particular, the images and slogans that would be prohibited by H.R. 1250/1493—is not inherently misleading. Portraying attractive people as smokers is not misleading—many such people *do* smoke. And portraying smoking a particular brand as pleasurable is not misleading—smoking *is* pleasurable for people who smoke.

The Supreme Court and lower federal courts have consistently rejected arguments that advertising may be restricted because the public is so naive that it might be misled by the stock-in-trade of Madison Avenue. In *Bates,* for example, the Court refused to accept the proposition that the public "is not sophisticated enough to realize the limitations of advertising." 433 U.S. at 374-75. Similarly, in *Zauderer* the Court described the argument that illustrations may have a misleading subconscious effect on the viewer as based on "little more than unsupported assertions." 471 U.S. at 648.[26]

In *Dunagin* v. *City of Oxford,* 718 F.2d 738 (5th Cir.) (en banc), *cert. denied,* 467 U.S. 1259 (1984), a federal court of appeals squarely rejected the

[26] H.R. 1250/1493's proposed ban on tobacco product "promotion"—event sponsorship and the use of tobacco product trademarks on nontobacco products—is based *entirely* on "unsupported assertions" with respect to its effects. The apparent premise of this latter prohibition is that the use of a tobacco product trade name or trademark to sell a nontobacco product is an indirect means of advertising or promoting the tobacco product, rather than a means of exploiting a trade name or trademark that has become valuable in connection with the marketing of one product (the tobacco product) to sell another (the nontobacco product).

argument that advertisements identifying alcoholic beverages with the "good life" are misleading:

> "Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells." 718 F.2d at 743.

Similarly, in *Oklahoma Telecasters Ass'n* v. *Crisp,* 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds,* 467 U.S. 691 (1984), another federal court of appeals noted that almost all advertising tends to "project an image of [those who buy the advertised product] as successful, fun-loving people." 699 F.2d at 500 n.9. But the court held that such advertising is not on this account inherently misleading and thereby deprived of First Amendment protection. *Ibid.*

The court in *Dunagin* also explained that the mere fact that certain advertising may not be acceptable for children cannot justify restrictions on advertising directed to adults. 718 F.2d at 743. In reaching this conclusion, the court of appeals relied on the Supreme Court's decision in *Youngs Drug Products,* where the Court stated that "the government may not 'reduce the adult population * * * to reading only what is fit for children.'" 463 U.S. at 73 (quoting *Butler* v. *Michigan,* 352 U.S. 380, 383 (1957) (invalidating a statute that prohibited reading materials deemed inappropriate for children)).[27]

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[27] *See also Advertising Tobacco Products: Hearings on H.R. 1272 and H.R. 1535 before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 100th Cong., 1st Sess. 99 (1987 Hearings) (testimony of Professor Burt Neuborne, New York University Law School).

No advertising could be *less* "deceptive" than advertising required to carry government-mandated messages such as those required in tobacco product advertising. As the Ninth Circuit ruled in an opinion by Judge Anthony M. Kennedy, "there is no deception * * * unless the public holds a belief contrary to material facts *not* disclosed." *FTC* v. *Simeon Management Corp.*, 532 F.2d 708, 716 (9th Cir. 1976) (emphasis added). There is virtually universal knowledge of the health claims that have been made with respect to tobacco products. According to the Surgeon General, "by the time they reach seventh grade, the vast majority of children believe smoking is dangerous to one's health."[28]

It is plain, then, that the visual components of current tobacco product advertising—from bold abstract designs and vivid slogans to attractive models in attractive settings—cannot be considered inherently deceptive or misleading. Because H.R. 1250/1493 would prohibit protected speech, it must survive scrutiny under the last two prongs of the *Central Hudson* test. It cannot do so.

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[28] *Smoking and Health: A Report of the Surgeon General,* 17-10 (1979). According to a 1979 survey of 2,639 boys and girls aged 12-18 conducted by the National Institute of Education, over 96 percent of those questioned said they believed that "smoking is harmful to health." Chilton Research Services, *Teenage Smoking: Immediate and Long Term Patterns,* pp. 18-19 (National Institute of Education, Dep't of Health and Human Services, 1979). Of 895 children and adolescents questioned in a subsequent survey, over 98 percent said they believed smoking is harmful and "accurately named one or more body parts that are adversely affected by smoking." Leventhal, H., Glynn, K., & Flemming, R. "Is the smoking decision an 'informed choice'?" 257 *J. Am. Medical Ass'n* 3373-76 (1987).

2. H.R. 1250/1493 Would Not Reduce Demand for Tobacco Products

H.R. 1250/1493 would not "directly advance" the goal asserted by Representatives Luken and Synar to reduce tobacco use by young people.

The Supreme Court carefully scrutinizes the asserted link between restrictions on commercial speech and the proffered governmental interest, and in the past it typically has found that link wanting.[29] Far from deferring to legislative determinations in this area, courts "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy."[30]

The available evidence demonstrates that restrictions on tobacco product advertising do not reduce demand for tobacco products. As noted, such advertising is not intended to, and does not, persuade nonsmokers to smoke. Instead, it promotes interbrand competition for persons who have decided for other reasons to become smokers. H.R. 1250/1493 thus would interfere gratuitously with competition, without significantly affecting the number of smokers or their demand for tobacco products.[31] As

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[29] *E.g., Linmark,* 431 U.S. at 565 n.7 (no "definite connection" between restrictions and governmental interest had been shown); *Bolger,* 463 U.S. at 73.

[30] *Central Hudson,* 444 U.S. at 566 n.9; *see also, e.g., City of Los Angeles* v. *Preferred Communications, Inc.,* 476 U.S. 488 (1986).

[31] *See* J. Hamilton, "The Demand for Cigarettes: Advertising, the Health Scare, and the Cigarette Advertising Ban," *The Review of Economics and Statistics,* vol. 54, at 401-411 (1972); R. Schmalensee, *The Economics of Advertising* (1972); L. Schneider, B. Klein & K. Murphy, "Governmental Regulation of Cigarette Health Information," *The Journal of Law and Economics,* vol. 29, at 575-612 (1981);

Judge Wright stated in 1971: "While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke."[32]

In his latest report, the Surgeon General observed that "[t]here is no scientifically rigorous study available to the public that provides a definitive answer to the basic question whether advertising and promotion increase the level of tobacco consumption." *Reducing the Health Consequences of Smoking: 25 Years of Progress* 512 (1989). As the Task Force on Smoking reported to the Ontario Council of Health in 1982, "mass media and advertising are *thought* to be significant influences on smoking" but "[n]o persuasive empirical evidence exists." *Smoking and Health in Ontario: A Need for Balance,* p. 104 (1982) (emphasis in original). As early as 1975, Karl Wärnberg advised the 3rd World Conferfence on Smoking and Health:

> "To summarize, there is no evidence to support the view that a ban on advertising would have a positive effect on smoking habits. No empirical research has been able to show that aggregate brand advertising leads to greater total tobacco consumption. Nor has anything been found to sug-

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B. Baltagi & D. Levin, "Estimating Dynamic Demand for Cigarettes Using Panel Data: The Effects of Bootlegging, Taxation and Advertising Reconsidered," *The Review of Economics and Statistics,* at 148-155 (1986); M. Waterson, *Advertising and Cigarette Consumption* (1983).

[32] *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 588 (D.D.C. 1971) (three-judge court) (dissenting opinion), *aff'd mem.,* 405 U.S. 1000 (1972).

gest that advertising entices nonsmokers, young people in particular, into becoming smokers. It follows, therefore, that there can be no evidence showing that a ban on advertising would result in reduced tobacco consumption and fewer new smokers."[33]

Reps. Luken and Synar have suggested that attractive visual imagery influences children, in particular, to start smoking. Again, the evidence is directly to the contrary. As the director of NIH's National Institute of Child Health and Human Development testified in 1983, "[t]he most forceful determinants of smoking [by young people] are parents, peers, and older siblings."[34] This is confirmed by statistical research demonstrating that children's attitudes towards smoking are developed primarily through their experiences with parents, other family members and peers.[35]

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[33] Wärnberg, "Ban on Advertising—What Then?," *Proceedings on the 3rd World Conference on Smoking and Health,"* vol. 2, p. 854 (1975). *See also* Hamilton, "The Effects of Cigarette Advertising Bans on Cigarette Consumption," *id.* at 829. Dr. Hamilton explained that cigarette advertising is "a competitive weapon" and "has not been used as a means for expanding [the] market." *Id.* at 830-31.

[34] *Smoking Prevention Education Act: Hearings on H.R. 1824 before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce,* 98th Cong., 1st Sess. 53 (1983) (testimony of Dr. Mortimer B. Lipsett). *See also* S. Ward, D. Wackman & E. Wartella, *How Children Learn To Buy* (1979); *1986 Hearings, supra,* at 682-83 (statement of Dr. Ward); *1987 Hearings, supra* (statement of Dr. Ward).

[35] *See, e.g.,* A. McAlister, J. Krosnick & M. Milburn, "Causes of Adolescent Cigarette Smoking: Tests of a Structural Equation Model," 47 *Social Psychology Quarterly,* 24-36 (1984); B. Flay, J. d'Avernas, J. Best, M. Kersell & K. Ryan, "Cigarette Smoking: Why Young People Do It and Ways of Preventing It," in *Pediatric*

The evidence also shows that the attractive images displayed in tobacco product advertising are not accepted by youngsters as representing typical smokers. Rather, children view the stereotypical smoker as less educationally successful, less healthy and "tougher" than the stereotypical nonsmoker.[36] In short, children report a distinct image of "the smoker," but it is hardly the flattering one that antitobacco advocates attribute to advertising. Children are more likely to smoke when their own self-image corresponds to the largely *negative* stereotypical image that they have of smokers[37]—a factor that certainly cannot be traced to tobacco product advertising in general or to its supposedly seductive models, scenery or other content.

Even the most zealous antitobacco advocates have

Behavioral Medicine (P. Firestone *et al.* eds. 1983); B. Bewley, J. Bland & R. Harris, "Factors Associated with the Starting of Cigarette Smoking by Primary School Children," 28 *British Journal of Preventive and Social Medicine,* 37-44 (1974).

[36] *See, e.g., 1986 Hearings, supra,* at 712-16 (statement of Dr. Roger D. Blackwell, Professor of Marketing, Ohio State University); L. Chassin, C. Presson, S. Sherman, E. Corty & R. Olshavsky, "Self-images and Cigarette Smoking in Adolescence," 7 *Personality and Social Psychology Bulletin,* 670-76 (1981); A. McKennell & J. Bynner, "Self-image and Smoking Behavior Among School Boys," 39 *British Journal of Educational Psychology,* 27-39 (1969); J. Barton, L. Chassin, C. Presson & S. Sherman, "Social Image Factors as Motivators of Smoking Initiation in Early and Middle Adolescence," 53 *Child Development,* at 1499-1511 (1982).

[37] *See, e.g., 1986 Hearings, supra,* at 712-16 (statement of Dr. Blackwell); L. Chassin *et al.,* "Self-images and Cigarette Smoking in Adolescence," *supra;* J. Barton *et al.,* "Social Image Factors as Motivators of Smoking Initiation in Early and Middle Adolescence," *supra.*

admitted that cigarette advertising does not cause young people to start smoking. Michael Pertschuk, the former Chairman of the Federal Trade Commission, has stated that "[n]o one really pretends that advertising is a major determinant of smoking in this country or any other."[38] The Swedish National Smoking and Health Association concluded in 1983 that "the smoking habits of children are dependent on the smoking habits of their parents." *Smoking Control in Sweden,* p. 9 (1983).

A major cross-country survey by researchers for the World Health Organization recently found "no systematic differences" between the smoking habits of young people in countries where tobacco advertising is completely banned and in countries where it is not.[39] Another international survey demonstrates that the incidence of smoking among young people bears no relation to the extent of advertising restrictions in the particular country.[40] In several countries

[38] Tobacco Issues, Institute of Politics, Harvard University, April 27, 1983, Tr. 8-9.

[39] Aarø, Wold, Kannas & Rimpelä, "Health Behaviour in Schoolchildren: A WHO Cross-National Survey" (May 1986), 1(1) *Health Promotion,* p. 32.

[40] Int'l Advertising Ass'n, *Why Do Juveniles Start Smoking?* (J. Boddewyn ed. 1986). In Norway, for example, 11 years after a total advertising ban was imposed, the proportion of 7-15 year-olds who smoke regularly (13 percent) was nearly *twice* as high as in Spain (7 percent), where only minor advertising restrictions were in effect, and more than *four times* as high as in Hong Kong (3 percent), where no advertising controls existed. *Id.* at 9. In Norway, 36 percent of all 15 year-olds smoked in 1986, while in Spain the figure was 27 percent and in Hong Kong the figure was 11 percent. *Id.* at 11. *See 1986 Hearings, supra,* at 642-43 (statement of Dr. Boddewyn); *1987 Hearings, supra* (statement of Dr. Boddewyn).

where tobacco advertising was banned, the incidence of smoking among young people actually increased following the imposition of the ban.

Finland. In Finland, tobacco product advertising has been banned completely since 1978. Nevertheless, University of Helsinki researchers discovered that smoking among minors—which had been declining sharply before the ban was imposed—increased after imposition of the ban. In particular, the incidence of smoking among 12-18 year-olds of both sexes had been declining sharply in the period preceding the ban in 1978, but generally stabilized between 1979 and 1985. Then, between 1985 and 1987, the evidence showed "a clear increase in smoking * * * among adolescents." The researchers noted that the increase had been greatest among girls aged 16-18—from 25 percent in 1979-1985 to 32 percent in 1985-1987.[41]

Sweden. In Sweden, where tobacco advertising on billboards and in most other media was banned in 1979, the incidence of smoking among minors, which had been decreasing before the ban was imposed, increased between 1979 and 1982. It then resumed its decline—only to begin increasing again in 1984. Smoking is still on the rise among Swedish teenagers, despite the advertising ban. Smokeless tobacco use by teenagers nearly quadrupled between 1976 and

[41] Rimpelä, Rimpelä, Karvonen, Rahkonen, Siivolva & Kontula, *Changes in Adolescents' Health Habits 1977-1987: Preliminary Report to the National Board of Health* (May 1987).

1986, notwithstanding the ban and rigorous anti-tobacco education efforts.[42]

Norway. In Norway, where tobacco product advertising was completely banned in 1975, it has been asserted that daily smoking among 13-15 year-old schoolchildren declined sharply after the ban was imposed.[43] But the actual data show that self-reported daily *and* occasional smoking among boys in this age group was declining sharply *before* the imposition of the advertising ban. The data also show that daily *and* occasional smoking in this age group actually increased among 13 year-old boys and girls after 1975.

The results reported for Norway thus may reflect nothing more than the unwillingness of the schoolchildren who were interviewed to identify themselves as *daily* smokers. Conspicuously, the authors fail to note the proportion of schoolchildren who were willing to identify themselves as *daily and occasional* smokers. The significance of the claims made by the authors of this study is questionable even if those claims are taken at face value.[44] The Chief of the

[42] National Board of Health and Welfare, *Tobacco Control in Sweden,* pp. 6-7 (1987).

[43] *E.g.,* K. Bjartveit & K. Lund, *Smoking Control in Norway,* p. 4 (Oslo, Nov. 1987); Bjartveit, "Legislation and Political Activity," *Proceedings on the 5th World Conference on Smoking and Health,* vol. 1, p. 26 (Winnipeg, 1983).

[44] The previous nationwide study—performed by a different organization—had conducted in 1963, and the prevalence of daily smoking in the 13-15 year-old age group may well have peaked as early as 1970, when the prevalence of adult smoking also peaked, and declined thereafter. *See* Aarø, Hauknes & Berglund, "Smoking Among Norwegian School Children 1975-1980," *Scandinavian J. of Psychology* (1981) 22:(3), p. 165.

Tobacco Products Unit in Canada has questioned the reliability of the study on the ground that it is "based on small samples of a rather narrow age range." The Norway data, he said, do *not* offer "compelling evidence that banning tobacco product advertising reduces either smoking by youth or overall tobacco consumption."[45]

Because it could not be shown that restricting tobacco product advertising would reduce consumption by minors or adults, H.R. 1250/1493 could not meet the *Central Hudson* requirement of directly advancing a legitimate governmental interest.

3. H.R. 1250/1493 Would Not Satisfy the "Narrow Tailoring" Requirement

H.R. 1250/1493 also would not satisfy the fourth element of the *Central Hudson* test—that it be a "narrowly tailored" means of achieving the government's interest. First, when concerns about commercial speech arise, the preferred approach is to assure that more information is available—not less.[46]

[45] Collishaw, *Commentary on Application To Regulate Tobacco Products under the Hazardous Products Act by Physicians for a Smoke-Free Canada,* pp. 1-2 (May 12, 1986).

[46] *See, e.g., Bates,* 433 U.S. at 375 ("the preferred remedy is more disclosure, rather than less"); *Whitney* v. *California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("the fitting remedy for evil counsels is good ones"). Federal legislation already requires cigarette and smokeless tobacco advertising to carry health messages. It also directs the Secretary of Health and Human Services to establish and carry out a broad program to educate the public with respect to "any dangers to human health presented by cigarette smoking." Comprehensive Smoking Education Act, 15 U.S.C. § 1341(a); Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401(a).

Second, as explained above, H.R. 1250/1493 is functionally equivalent to an outright ban on all tobacco product advertising, the broadest possible prohibition. As such, the proposal would prompt the most searching scrutiny for available alternatives. Even if H.R. 1250/1493 were not considered to be tantamount to an outright ban, the issue is not whether its approach is narrower than some other prohibition, but whether it is a "narrowly tailored" means of achieving the asserted governmental purpose.

If the real motivation for banning promotion and eliminating images and slogans from advertising is that they "may lend the tobacco industry an image of 'wholesomeness,'"[47] this concern can hardly serve as a legitimate basis for restrictions on speech. In *Kingsley,* for example, the Court ruled that a portrayal of adultery could not be banned because it portrayed adultery in an "attractive" light. 360 U.S. at 389. In *Carey,* the Court ruled that contraceptive advertising could not be banned because it "legitimized" illicit sexual behavior. 431 U.S. at 701. Conversely, in *Bates* the Court refused to accept the argument that advertising would "tarnish the dignified public image of the [legal] profession" as a ground for restricting commercial speech by lawyers. 433 U.S. at 368. *See also Virginia Pharmacy Board,* 425 U.S. at 766-70 (rejecting similar argument with respect to pharmacists).

The concept of banning advertising of a lawful product to signal official disapproval of a product or service represents a frightening form of commercial

[47] K. Warner, *Selling Smoke* 54 (1986).

"blacklisting." Moreover, if banning advertising is undertaken to make tobacco products *seem* illicit, such an approach surely would make tobacco products more attractive to youngsters, not less so.[48]

D. H.R. 1250/1493 Would Invite Censorship by State and Local Governments

At best, the "antipreemption" provisions of H.R. 1250/1493 would Balkanize regulation of the labeling and advertising of a nationally marketed product—an outcome at odds with the First Amendment values protected by the existing system of uniform national control over cigarette labeling and advertising. More likely, antismoking advocates would exploit the weakening of federal preemption to justify prohibitive state and local labeling and advertising requirements, or even outright advertising bans. Congress preempted state and local regulation of cigarette labeling and advertising precisely in order to avoid such speech-related burdens.

The validity of the "antipreemption" provisions under the First Amendment is suspect both because of its apparent purpose and because of its likely effect. To the extent that the provision is intended to facilitate the imposition of prohibitive cigarette labeling and advertising requirements or outright advertising bans, H.R. 1250/1493 obviously would

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[48] *Health Protection Act of 1987: Hearing on H.R. 1272 and H.R. 1532 before the Subcomm. on Transportation, Tourism & Hazardous Materials of the House Comm. on Energy and Commerce,* 100th Cong., 1st Sess. 38 (1987) (statement of Rep. Luken).

violate the First Amendment.[49] As a deliberate, attempt by Congress to pave the way for state and local cigarette advertising bans or discriminatory warning requirements, the proposed legislation would be "plainly illegitimate." *See City of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 804 (1984).

Even if the purpose of the "antipreemption" provision were not censorship, that would not immunize it from First Amendment scrutiny. As the Supreme Court repeatedly has emphasized, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *City of Emporia,* 407 U.S. 451, 462 (1972). A statute challenged under the First Amendment "must be tested by its operation and effect." *Near* v. *Minnesota,* 283 U.S. 697, 708 (1931). Where abridgment of First Amendment rights is asserted, courts must "examine the effect of the challenged legislation." *Schneider* v. *State,* 308 U.S. 141, 161 (1939).

CONCLUSION

The prohibitions and restrictions that would be imposed by H.R. 1250/1493 are tantamount to a ban on tobacco product advertising and promotion. They rest on the mistaken premise that advertising significantly influences young people to begin smoking—and that banning such advertising would lead to decreased smoking among young people. Experience belies that premise, as antismoking advocates them-

[49] *See, e.g., Grosjean* v. *American Press Co.,* 297 U.S. 233, 250 (1936); *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 402-03 (1950).

selves repeatedly have acknowledged. The proponents of H.R. 1250/1493 could not demonstrate that it would directly advance their goals or that it would be a "narrowly tailored" means of doing so. H.R. 1250/1493 therefore would violate the First Amendment.

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